GANESWARY PONNUDURAI

v

DR R RAMACHANDRAN

HIGH COURT MALAYA, KUALA LUMPUR
DATUK WIRA MOHD NOOR AHMAD J
[COMPANIES WINDING-UP NO: D1-28-16-92]
7 JUNE 1996

CIVIL PROCEDURE: *Winding-up petition – Petition made pursuant to ss 181 and 218(1)(f) & (i) of the Companies Act 1965 – Whether a hybrid petition – Whether petition valid*

COMPANY LAW: *Winding-up – Whether just and equitable – Companies Act 1965, ss 181, 218(1)(f) & (i) – Petitioner shut off from control and management of company – Management taken over by respondent's family – Petitioner retired as director in her absence – Whether affairs of company conducted by respondent in oppressive manner – Whether circumstances outside the contemplation of parties when company was formed*

This was a petition for the winding-up of Prismatic Sdn Bhd ('the company') pursuant to ss 181 and 218 (1)(f) & (i) of the Companies Act 1965 ('the Act') on the grounds that the petitioner had been completely shut off from the management of the company and that the respondent was conducting the affairs of the company in an oppressive manner.

According to the evidence, the company was bought over as a shelf company sometime in 1983 by Mathimugam, the respondent's brother, and it was agreed between the said Mathimugam and Nagalingam, the petitioner's husband and representative, *inter alia* that both sides would have equal shares in the company and control and management of the company would be on a joint and consultative basis. Pursuant to the agreement, substantial amounts were advanced as loans to the company by Nagalingam and the petitioner's brother and family properties were charged to raise funds to lend to the company. Mathimugam also transferred a house to the company and certain quoted shares owned by Mathimugam were brought into the books of the company as its assets.

The company was jointly run by Mathimugam and Nagalingam and this arrangement worked well until early 1987 when Mathimugam migrated to Australia and the respondent stepped into his shoes as his nominee. Thereafter, the petitioner and her representatives were increasingly left out from the management of the company and replaced by members of the respondent's family. On 2 December 1989 an annual general meeting was held where the petitioner was retired as a director due to her absence at the meeting. After

2 December 1989, the management of the company was totally taken over by the respondent's family.

The petitioner claimed *inter alia* that she failed to attend the meeting as she had not received notice of it, that 30,001 shares had been transferred to her by one S. Paramanathan but the board had resolved that the transfer was null and void as the transfer form had been executed without the prior approval of the board. Furthermore, she and her representative were excluded as signatories to cheques of the company and her attempts to obtain financial documents of the company had been unsuccessful. The respondent claimed that the petition which relied on two different sections of the Act ie ss 181 and 218(1)(f) & (i) was a hybrid petition and thus invalid.

The issue was whether it was just and equitable to wind up the company.

Held:

[1] The Court is in complete agreement with T Selventhiranathan JC (as he then was) in the interlocutory proceeding in *Ganeshwary d/o Ponnudurai v. Prismatic Sdn. Bhd.* [1994] 4 CLJ 671 @ 679, who held that the petition was not a hybrid petition. This is fortified by the decisions in *Re Lundie Brothers Ltd* and *Re Ebrahimi* where the prayers were based on both ss 210 and 222 of the English Companies Act 1948, the latter section being *in pari materia* to our s 218, but the winding-up orders were made under s 222(f).

[2] The Court is more inclined to believe the petitioner's reason for not attending the annual general meeting as the respondent in his affidavit in opposition did not exhibit a copy of the said notice nor did he exhibit any document indicating that the notice was served either personally on the petitioner or sent through the post in a prepaid letter as required under Clause 153 of the articles of association. Furthermore, the petitioner, being the only representative on her side with her family properties at stake in the venture and in addition to the fact that at that juncture the audited accounts for the year ended 31 December 1988 had yet to be passed, it is rather hard to believe that she would purposely refrain from attending the said annual general meeting had she been served with the notice.

[3] Without considering the validity of the transfer of shares to the petitioner, the incident supports the fact that the respondent had made it difficult for the petitioner to achieve what was envisaged in the original understanding whereby both sides were to have equal shares in the company. Had the respondent wanted to abide by the terms of the agreement, he could have easily signed the resolution prepared without much fuss about it and the transfer could be validated because the other signatory required for the resolution was the petitioner herself.

[4] Although the petitioner's representative, Nagalingam, remained as a signatory until August 1989, the arrangement devised meant that it was not essential that her representative had to sign the cheques for the cheques to be valid for payments. This was not in consonance with the original understanding whereby the control and management of the company was to be on a joint and consultative basis.

[5] The evidence shows that the petitioner had been chasing for the records and documents of the company including the statement of accounts, statement of receipt and expenditure, profit and loss statement and balance sheet at least for the years after she was purportedly retired as a director but was unsuccessful. Also, she had requisitioned for an extraordinary general meeting to be held but was refused on flimsy grounds. Such a situation has defeated the spirit of the original understanding.

[6] In light of the foregoing, it is an irresistable conclusion that the confidence of both sides towards each other had been undermined. That being the case, the company is now in a state which could not have been contemplated by the parties when the company was formed; and the petitioner was not solely responsible for the situation which had arisen. Therefore, it is just and equitable that the company be wound up.

[Petition allowed with costs]

Cases referred to:
Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360 ***(foll)***
Re Yenidje Tobacco Co Ltd [1916-17] All ER Rep 1050 ***(foll)***
Re Wondoflex Textiles Pty Ltd [1951] VLR 458 ***(foll)***
Re Davis And Collett Ltd [1935] All ER Rep 315 ***(refd)***
Re Lundie Brothers Ltd [1965] 2 All ER 692 ***(refd)***
Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290 ***(dist)***
Ganeshwary d/o Ponnudurai v Prismatic Sdn Bhd [1994] 4 CLJ 671 ***(foll)***

Legislation referred to:
Companies Act 1965, ss 181, 218(1)(f), (i)
Companies Act 1948 (UK), ss 210, 222, 222(f)

For the petitioner - M Kayveas; M/s Blanche Kayveas & Co
For the respondent - Bastian Vendargon; M/s Vendargon & Partners

JUDGMENT

Mohd Noor Ahmad J:

In this petition, the petitioner prayed for, *inter alia* that Prismatic Sdn Bhd (hereinafter referred to as 'the company') be wound up. She alleged that she had been completely shut off from the management of the company by one Dr Ramachandran, who opposed this petition. She also pleaded facts alleging that Dr Ramachandran was conducting the affairs of the company in an

oppressive manner. With regard to her other prayers, she had obtained the relevant orders from the Court in an *ex parte* application by way of summons in chambers on 11 January 1992. Now, the only matter before this Court is the prayer for the company to be wound up on the ground that it is just and equitable to do so.

The facts reveal that:

(1) the company was initially bought over as a shelf company sometime in 1983 by one R Mathimugan, a brother of Dr Ramachandran. It was agreed between Mathimugan and one Nagalingam s/o Subramaniam, the petitioner's husband, *inter alia* that:

(a) the company would be an investment and holding company for Mathimugan and the family of Nagalingam;

(b) both sides would have equal shares in the company;

(c) both sides would be on the board of directors of the company;

(d) control and management of the company would be on a joint and consultative basis;

(e) Nagalingam was to arrange for the family properties of the petitioner to be used as collateral to obtain loans to be advanced and/or lent to the company for its investments. The company was to service the interest and settle the loans so obtained;

(f) Mathimugan would bring his assets into the company.

(hereinafter referred to as the "original understanding").

Pursuant to the agreement, two family properties of the petitioner were charged to raise funds to lend to the company. Substantial amounts were also advanced as loans to the company by Nagalingam and the petitioner's brother, one Jeyasingam s/o Ponnudurai on the understanding that the company would service the interest and settle the loans so that the properties arranged as collaterals would be redeemed. A house belonging to Mathimugan was transferred to the company and the sale consideration was paid in part and the balance was treated as a debt by the company to Mathimugan's wife at Mathimugan's request. Certain quoted shares owned by Mathimugan were brought into the books of the company as its assets. To my mind, the company is a private company in resemblance to a partnership.

(2) The company made investments in selected shares and landed properties. The company also obtained other loans from financial institutions and certain individuals for its investments and business.

(3) In the beginning the arrangement worked quite well with Mathimugan at the helm and Nagalingam as representative of the petitioner. However, some time in March or April 1987 Mathimugan left for Australia for good and Dr Ramachandran stepped into his shoes as his nominee. The petitioner and her representatives were increasingly left out from the management of the company and replaced by members of the family of Mathimugan and Dr Ramachandran. At the annual general meeting of the company held on 2 December 1989 the petitioner was purportedly retired as a director of the company for not being re-elected due to her absence from the meeting. Subsequently, the management of the company was taken over by the family of Mathimugan and Dr Ramachandran to the exclusion of the petitioner's family. After 2 December 1989 the directors of the company were:

(a) Dr Ramachandran,

(b) Nelson Edward Gomez (the brother-in-law of Mathimugan and Dr Ramachandran),

(c) Christine S Nelson Edward Gomez (the sister of Mathimugan and Dr Ramachandran and the wife of Nelson Edward Gomez),

(d) R Sathia Devi a/p R Ratnasingam (the sister of Mathimugan and Dr Ramachandran),

(e) Srimathi Subadra Devi a/p S. Ratnasingam (the sister of Mathimugan and Dr. Ramachandran).

The petitioner alleged that the various actions by Dr Ramachandran and/or the directors appointed at his instance were:

(i) a cunning and pre-planned scheme by Dr Ramachandran to usurp control of the company for himself;

(ii) to keep the petitioner and/or her nominee/appointee out of the management of the business of the company and to prevent the petitioner from knowing about the financial affairs of the company and how its funds were being utilized;

(iii) to deny and deprive the petitioner of her financial entitlements and cause damage and financial loss to her;

(iv) to deny and deprive the petitioner of her rights and entitlements;

(v) to control and manage the affairs and finances of the company on his own for his sole benefit and/or that of Mathimugan to the detriment of the petitioner;

(vi) to frustrate the petitioner and render meaningless and valueless her 50% ownership of the company;

(vii) to subject the petitioner's family properties to foreclosure action and cause loss and damage.

Having scrutinized the affidavit and documentary evidence, I am not satisfied that the allegations contained in paras (iii), (v), (vi) and (vii) have been clearly made out. However, what I am certain is that, since the unfortunate retirement of the petitioner as a director of the company, the control and management of the company had been taken over completely by the family of Mathimugan and Dr Ramachandran to the exclusion of the petitioner's family which resulted in the deprivation of the petitioner's rights and entitlements in the management of the company. That being the case, what I have to consider now, in the light of the prevalling circumstances whether it is just and equitable that the company be wound up under s 218(1)(i) of the Companies Act 1965 (hereinafter referred to as 'the Act').

It is settled law that if the Court is of the view that the members of the company are in substance partners, or quasi-partners a winding-up may be ordered if such facts are shown as could justify a dissolution of partnership between them on just and equitable ground (*Ebrahimi v Westbourne Galleries Ltd. & Ors.* [1973] AC 360 per Lord Wilberforce @ 375 & 376). In *Re Yenidje Tobacco Co Ltd* [1916-17] All ER Rep 1050 @ 1052 Lord Cozens-Hardy MR said:

> But, whether it (deadlock) exists, or not, I think that the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed.

Lord Wilberforce in *Ebrahimi's* case agreed with Lord Cozens-Hardy MR that the words 'just and equitable' need not be confined only to true deadlock cases (deadlock between directors in the management of the company). In *Re Wondoflex Textiles Pty. Ltd* [1951] VLR 458 Smith J at p 467 said that one purpose of the just and equitable provision is to enable the Court to relieve a party from his bargain even though what had been done by the other party was a valid exercise of the powers conferred by the articles of association but the act might nevertheless be entirelly outside what could fairly be regarded as having been in contemplation of the parties when they became members of the company. People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended, unless indeed, the party who wished to end it has been solely responsible for the situation which has arisen (*Re Ebrahimi's* case). It is not necessary, in order to induce the Court to interfere, to show

personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it (*Re Yenidje Tobacco Co Ltd's* case). In *Re Davis and Collett Ltd.* [1935] All ER Rep 315 where the company in substance was a partnership and one director had purported by means of irregularities to acquire complete control of the company and to exclude the other director or directors from the management of it, a winding-up was granted on just and equitable grounds within the meaning of s 222 of the English Companies Act 1948 which is *in pari materia* to our s 218. In *Re Lundie Brothers Ltd.* [1965] 2 All ER 692 where one of the directors of a private company (in substance a partnership) had been forced out of his position as a working director, a winding order was made under the same section. The words 'just and equitable' under s 218(1)(i) of the Act are not merely confined to matters *ejusdum generis* as the preceding clauses of the section (*Re Ebrahimi's* case)

The facts relating to the incorporation of the company, its original membership and objectives and the original understanding between the original members and the initial funding of the company by the respective family members, as enumerated in para 2 above, have not been seriously challenged; therefore, they should be regarded as undisputed and accepted. The petitioner grounded her petition on ss 181 and 218(1)(f) and (i) of the Act. En. Vendargon, the learned Counsel for Dr. Ramachandran contended that the petition was hybrid purporting to be presented under two different sections of the Act which could not be done. He relied on the case of *Lai Kim Loi v. Dato' Lai Fook Kim & Anor.* [1989] 2 MLJ 290. To my mind, that case can be distinguished from the present case. In that case, there was a writ of summons with a statement of claim indorsed and a petition to wind up the company in question; since there were two separate actions there seeking substantially the same relief, the Court struck out the petition. I am in complete agreement with T Selventhiranathan JC (as he then was) in the interlocutory proceeding in *Ganeshwary d/o Ponnudurai v. Prismatic Sdn. Bhd.* [1994] 4 CLJ 671 @ 679, who held that the petition was not a hybrid-petition. I am fortified in this case by the decisions in *Re Lundie Brother Ltd's* case and *Re Ebrahimi's* case, where the prayers were based both under the ss. 210 and 222 of the English Companies Act 1948 but the winding-up orders were made under s 222(f).

The petitioner contended that she is a 50% holder in the company and produced documentary evidence in support thereof. However, Dr Ramachandran claimed that the petitioner owned only 30% of the shares in the company because the purported transfer of the 20% shares to her by one S Paramanathan who was Mathimugan's nominee was riddled with irregularities. T Selventhiranathan JC

(as he then was) in the interlocutory proceeding held that the petitioner had proved her point on this issue. For myself, this issue is not really relevant in my consideration as to whether or not the company should be wound up under the just and equitable clause under s 218(1)(i) of the Act. Therefore, I need not consider on the validity of the said transfer of shares. Suffice for me to say that, if the petitioner's contention is right and Dr. Ramachandran's claim is wrong, the petitioner being a 50% shareholder will not be able to bring her case under s 181 of the Act because she is not a minority shareholder that is being oppressed. Neither can the petitioner succeed under s 180 or s 218(1)(f) of the Act by the fact of her not being reelected as a director of the company at its annual general meeting of 2 December 1989 because the act complained of in this context has nothing to do with her status as a shareholder of the company at all (*Re Lundie Brothers Ltd.'s* case).

Now, I have to consider whether her complaints attract the application of s 218(1)(i) *vis-a-vis* the position of the law as enumerated in para 5 above. For the purpose, in my view, I need not go into the allegations of the petitioner against Mathimugam, and Dr Ramachandran in respect of their alleged mismanagement of the company and its financial affairs prior to her not being reelected as a director of the company, that is to say, prior to 2 December 1989. This is due to the fact that evidently during the relevant period, though inactive, she or her representative too had a hand in the management of the company and its financial matters. Further, I need not dwell on her allegations against Dr Ramachandran and/or the directors appointed at his instance as spelt out in para 3(iii), (v), (vi) and (vii) above because, as I have said earlier, the allegations had not been clearly made out. Now, what I need to concentrate is only on the facts leading to my conclusion as demonstrated in para 4 above, that is to say, on the certainty that now the control and the management of the company are completely in the hands of the family of Mathimugan and Dr Ramachandran to the exclusion of the petitioner's family.

(a) Firstly, the petitioner claimed that she is still a director of the company but Dr Ramachandran refuted the claim on the ground that she was not reelected at the said annual general meeting because she did not attend although duly informed about it. On the other hand, the petitioner asserted that she did not attend the annual general meeting because she did not receive notice of it. I am more inclined to believe her because (i) in his affidavit opposing the petition Dr Ramachandran did not exhibit a copy of the said notice nor did he exhibit any document indicating that the notice was served either personally on the petitioner or sent through the post in a prepaid letter as required under clause 153 of the articles of association, (ii) she being the only representative on her side and in the light of the original understanding and that her family properties were at stake in the venture and in addition to the fact that at that juncture the audited accounts for the year ended 31 December 1988 had yet to be passed, it is rather

hard to believe that she would on purpose refrain from attending the said annual general meeting had she been served with the notice and aware of the meeting.

(b) Secondly, the petitioner claimed that 30,001 shares had been transferred to her by S Paramanathan on 17 November 1986. This is reflected in the relevant register (see Encl (1) Exh G12). However, Dr Ramachandran contended that the transfer is invalid because the transfer form was executed without the prior board's approval. Although the resolution for the transfer was prepared it was unsigned (see Encl (31) Exh R29). At the board's meeting held on 28 November 1988 it was resolved that the transfer be treated as null and void and that S. Paramanathan be contacted to execute a fresh transfer, and the secretary was directed to handle the matter (see para (2)(d) of Exh R30 in Encl (31)). Subsequently, the relevant register was rectified to reflect the situation as resolved (see Exh R32 in Encl (31)). I am not considering on the validity of the transfer, but merely to highlight instances supporting the fact that Dr Ramachandran had made it difficult for the petitioner to achieve what was envisaged in the original understanding whereby both sides would have equal shares in the company. Had Dr Ramachandran wanted to abide by the terms of the agreement, he could have easily signed the resolution prepared without much fuss about it and the transfer could be validated because the other signatory required for the resolution is the petitioner herself. Be that as it may, why S Paramanathan was not made to execute a fresh transfer? Furthermore, why Exh R32 in Encl (31) was signed by Dr Ramachandran himself as director and not the company secretary, as done in Exh G12 in Encl (1)?

(c) Thirdly, the petitioner claimed that she was excluded as a signatory to cheques of the company from October 1987, and although her representative S Nagalingam remained as a signatory until August 1989, the arrangement devised meant that it was not essential that her representative had to sign the cheques for the cheques to be valid for payments. This is not in consonance with the original understanding whereby the control and management of the company would be on a joint and consultative basis.

(d) And lastly, the evidence shows that the petitioner had been chasing for the records and documents of the company including the statement of accounts, statement of receipt and expenditure, profit and loss statement and balance sheet at least for the years after she was purportedly retired as a director but was unsuccessful. Also, she had requisitioned for an extraordinary general meeting to be held but was refused on flimsy ground. To my mind, such situation has defeated the spirit of the original understanding.

In the light of the foregoing, it is irresistible to conclude that the confidence of both sides towards each other had been undermined. That being the case, I am satisfied that the company is now in a state which could not have been contemplated by the parties when the company was formed; and that the petitioner was not solely responsible for the situation which has arisen. It is not necessary for me to consider whether the company is solvent or otherwise because whether or not profits had been made it does not seem to me to remove the difficulty which now exists, which is contrary to the good faith and essence of this, that the parties formed the company managed by both sides which should be worked amicably, and it would not justify the continuance of the state of things which I find here (*Re Yenidje Tobacco Co.'s* case @ 1052).

Therefore, I am of the opinion that it is just and equitable that the company be wound up. And I now so order with the costs to the petitioner.

Reported by Cindy Chan